Supreme Court, U.S.
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In The
Supreme Court of the United States

SILVER SAGE PARTNERS, LTD.; RICHARD EARLIX; ROBERT E. FILLET; PAUL SABEN; MICHAEL LINSK; EDWARD MOORE, JR.; AND ALBERT PIMENTEL,

Petitioners,

v.

CITY OF DESERT HOT SPRINGS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE WRIT	1
I. The Ninth Circuit's Decision Is Consistent With The Bankruptcy Code And The Settled Law Of Federal Appellate Jurisdiction	3
A. Section 921(e) Does Not Authorize Interlocutory Review	5
B. The Bankruptcy Court's Order Is Not An Appealable "Collateral Order"	7
II. The Ninth Circuit's Decision Does Not Conflict With The Holding Of Any Court At Any Level	11
III. The Ninth Circuit's Decision Does Not Raise Any Issue Of Constitutional Law	12
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

In re Cash Currency Exchange, Inc., 762 F.2d 542 (7th Cir. 1985) 3, 9

In re Committee of Asbestos-Related Litigants, 749 F.2d 3 (2d Cir. 1984) 3

Cunningham v. Hamilton County, Ohio, 527 U.S. 198 (1999) 3

Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994) 7, 8, 10

Dunkley v. Rega Properties, Ltd. (In re Rega Properties, Ltd.), 894 F.2d 1136 (9th Cir. 1990) 3

Farber v. 405 N. Bedford Dr. Corp. (In re 405 N. Bedford Dr. Corp.), 778 F.2d 1374 (9th Cir. 1985) 3

Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988) 10

Guyther v. Hebb (In re Hebb), 53 B.R. 1003 (D. Md. 1985) 3, 8

Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989) 10

Path-Science Laboratories, Inc. v. Greene County Hospital (In re Greene County Hospital), 835 F.2d 589 (5th Cir. 1988) 9, 11

Pennbank v. Washabaugh (In re North and South Shenango Joint Municipal Authority), 673 F.2d 1301 (3d Cir. 1981) 11

In re Pleasant View Utility Dist., 27 B.R. 552 (M.D. Tenn. 1982) 11

Promenade Nat'l Bank v. Phillips (In re Phillips), 844 F.2d 230 (5th Cir. 1988) 3

TABLE OF AUTHORITIES – Continued

Page

United States v. Bekins, 304 U.S. 27 (1938) 2, 13

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) 10

Warner v. Unsecured Creditors' Committee (In re Warner), 94 B.R. 734 (M.D. Fla. 1988) 3, 8

Whaley v. United States, 76 B.R. 95 (N.D. Miss. 1987) 3

STATUTES AND RULES

11 U.S.C. § 109 12
§ 361 10
§ 362 10
§ 903 12
§ 904 12
§ 921 ..... *passim*
§ 930 10
§ 943 8

28 U.S.C. § 157 10
§ 158 ..... 1, 3, 6
§ 1292 6

Cal. Gov't Code § 43739 13
§ 53760 13

Fed. R. Bankr. P. 8005 5

REASONS FOR DENYING THE WRIT

The only question presented by the Petition is whether the Bankruptcy Court's order denying the Petitioners' objection to and motion to dismiss the Respondent's chapter 9 bankruptcy case is subject to immediate review on appeal. The Ninth Circuit answered this question in the negative, holding that the order was not final and not immediately appealable. Pet. at 1a-19a.

As they must, the Petitioners agree that the Bankruptcy Court's order was interlocutory. Pet. at 3, 11. The order did not determine any substantive rights or otherwise cause any irreparable harm to the Petitioners, who simply hold an unsecured claim against the Respondent. Rather, as the Ninth Circuit noted, the order "merely allows the municipality to proceed with the bankruptcy." Pet. at 2a, 15a. Under basic rules of federal appellate jurisdiction, the Petitioners therefore had no right to an immediate appeal of the order. *See* 28 U.S.C. § 158(a)(3) (review of an interlocutory order of the bankruptcy court is available only "with leave of the court").

Despite this, the Petitioners argue that the Ninth Circuit erred, and that a writ should be granted, because "Congress contemplated an interlocutory appeal as of right for such orders." Pet. at 3. This argument is premised upon a misinterpretation of section 921(e) of the Bankruptcy Code, which *prohibits* the issuance of a stay when *discretionary* interlocutory review is granted. Nothing in section 921(e) or any other part of the Bankruptcy Code *authorizes* an interlocutory appeal or otherwise overrides title 28's requirements for appellate jurisdiction.

More fundamentally, this is not an important question of federal law that would justify review in this Court. The

Petitioners thought so little of their current argument that they did not even cite section 921(e) or the legislative history on which they now rely either to the Bankruptcy Appellate Panel or to the Ninth Circuit's merits panel, raising the issue for the first time only in their petition for rehearing to the Ninth Circuit.

There also is no conflict among the circuits. Both the Fifth Circuit and the Ninth Circuit now have squarely held that an order denying an objection to a chapter 9 municipal bankruptcy case is interlocutory and not immediately reviewable. The unpublished opinion of the Third Circuit cited by the Petitioners (also for the first time in their petition for rehearing) does not conflict with those decisions. To the contrary, just as did the Fifth and Ninth Circuits, the Third Circuit *declined* immediate review of an order denying an objection to a municipal bankruptcy case. There is, in fact, not a single reported decision at any level concluding that an order like the Bankruptcy Court's order in this case is subject to an immediate interlocutory appeal.

Finally, there is no Tenth Amendment or other constitutional question here. This Court long ago upheld the constitutionality of the municipal bankruptcy laws, largely on the ground that the federal law is premised upon state consent. *United States v. Bekins*, 304 U.S. 27, 54 (1938). Here, the State of California specifically authorized the Respondent to file a bankruptcy case and invoke the protections of chapter 9. The State has never contended that the Respondent's bankruptcy case is improper or otherwise an affront to its sovereignty. In this light, the Petitioners' attempts to champion "states' rights" ring particularly hollow, and the Petitioners' invitation to

fashion a constitutional rule of immediate appeal is unavailing and unsupportable.

For these and the reasons set forth in more detail below, no grounds exist to grant a writ in this case, and the Respondent respectfully requests that the Court deny the Petition.

I. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE BANKRUPTCY CODE AND THE SETTLED LAW OF FEDERAL APPELLATE JURISDICTION

In bankruptcy cases, as in other litigation in the federal courts, an aggrieved litigant generally has the right to appeal only final orders of the bankruptcy court. 28 U.S.C. §§ 158(a)(1), 158(d).[1]

Pursuant to this final judgment rule, appellate courts routinely dismiss appeals taken from bankruptcy court orders that deny a creditor's motion to dismiss a debtor's voluntary bankruptcy case.[2] In the order at issue here, the

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[1] The "salutary purposes" of the final judgment rule are well recognized and need not be reiterated here. *See, e.g., Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 203 (1999).

[2] *E.g., Dunkley v. Rega Properties, Ltd. (In re Rega Properties, Ltd.)*, 894 F.2d 1136, 1137-39 (9th Cir. 1990); *Promenade Nat'l Bank v. Phillips (In re Phillips)*, 844 F.2d 230, 233-36 (5th Cir. 1988); *Farber v. 405 N. Bedford Dr. Corp. (In re 405 N. Bedford Dr. Corp.)*, 778 F.2d 1374, 1378-79 (9th Cir. 1985); *In re Cash Currency Exchange, Inc.*, 762 F.2d 542, 546 (7th Cir. 1985); *In re Committee of Asbestos-Related Litigants*, 749 F.2d 3, 5 (2d Cir. 1984); *Warner v. Unsecured Creditors' Committee (In re Warner)*, 94 B.R. 734, 735-36 (M.D. Fla. 1988); *Whaley v. United States*, 76 B.R. 95, 96 (N.D. Miss. 1987); *Guyther v. Hebb (In re Hebb)*, 53 B.R. 1003, 1005 (D. Md. 1985).

Bankruptcy Court did just that – it denied the Petitioners' objection to and motion to dismiss the Respondent's bankruptcy case. Pet. at 23a-51a.

Following the established precedent, the Bankruptcy Appellate Panel for the Ninth Circuit concluded that the Bankruptcy Court's order was interlocutory and therefore dismissed the Petitioners' appeal. Pet. at 20a-22a. The Ninth Circuit affirmed that dismissal, holding that "[t]he denial of an objection to and a motion to dismiss a chapter 9 bankruptcy does not irreparably injure a party so that later addressing the issue would be futile." Pet. at 3a, 19a.[3]

Despite their concession that the Bankruptcy Court's order is interlocutory, the Petitioners assert that the Ninth Circuit erred, and that the basic rule of finality should not apply here, because the Respondent's bankruptcy case was commenced under chapter 9 of the Bankruptcy Code rather than another chapter. Specifically, the Petitioners seek to bypass the final judgment rule by arguing that section 921(e) of the Bankruptcy Code uniquely authorizes interlocutory appeals in municipal bankruptcy cases and that the Bankruptcy Court's order is appealable under the "collateral order" doctrine. Neither argument has merit.

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[3] The Petitioners failed to reproduce a complete copy of the Ninth Circuit's amended opinion in their Appendix. Accordingly, citations to the opinion are made both to the pages of the Appendix containing the original opinion, and to the pages setting forth the amendments made on denial of the petition for rehearing. A complete copy of the amended opinion is published at 339 F.3d 782 (9th Cir. 2003).

A. Section 921(e) Does Not Authorize Interlocutory Review.

For the first time, the Petitioners argued in their petition for rehearing to the Ninth Circuit that section 921(e) of the Bankruptcy Code authorizes an immediate interlocutory appeal. The Ninth Circuit properly rejected this belated argument that now forms the centerpiece of the Petitioners' arguments.

Section 921 of the Bankruptcy Code concerns petitions and objections to petitions under chapter 9. Subsection (e) of section 921 is straightforward – it forbids any stay or delay pending appeal of an order finding jurisdiction over a chapter 9 case, and it validates debts incurred during the bankruptcy case even if such an order later is reversed on appeal:

> (e) The court may not, on account of an appeal from an order for relief, delay any proceeding under this chapter in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding pending such appeal. The reversal on appeal of a finding of jurisdiction does not affect the validity of any debt incurred that is authorized by the court under section 364(c) or section 364(d) of this title.

11 U.S.C. § 921(e).

The Petitioners argue that section 921(e) "presupposes a right to an immediate review by appeal" of orders like the one at issue in this case. Pet. at 10. To the contrary, the first part of section 921(e) simply *prohibits* the issuance of a stay when *discretionary* interlocutory review of the order is granted. The clear purpose of section 921(e) is to override provisions like Rule 8005 of the Federal Rules

of Bankruptcy Procedure, which otherwise empowers bankruptcy and appellate courts to stay proceedings pending an appeal. *See* Fed. R. Bankr. P. 8005.

The second part of section 921(e) merely protects the validity of debts incurred during a chapter 9 case in the event that an appellate court later finds that the bankruptcy court did not have jurisdiction. It does not speak to *when* an appeal may be taken, and it logically addresses the consequences of a reversal on an appeal taken after a final judgment concluding a bankruptcy case.

Nothing in section 921(e) *authorizes* an immediate interlocutory appeal. When Congress wants to grant such authorization, it does so explicitly and not implicitly or, to use the words of the Petitioners, by "presupposition." For example, Congress *expressly* has authorized immediate appellate review of "interlocutory orders and decrees issued under section 1121(d)" of the Bankruptcy Code. 28 U.S.C. § 158(a)(2). Congress also *expressly* has authorized immediate appellate review of (a) "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions"; (b) [i]nterlocutory orders appointing receivers. . . ."; and (c) [i]nterlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases." 28 U.S.C. § 1292(a).

There is no such express authorization here. To the contrary, Congress has limited appellate jurisdiction over orders like the Bankruptcy Court's order to those appeals where review is granted "with leave of the court." 28 U.S.C. § 158(a)(3). The legislative history cited by the Petitioners confirms this. The Senate's version of the precursor to section 921(e) specifically "*prohibited* interlocutory appeals from a finding of jurisdiction, in order to

prevent delay in the proceedings and increase the marketability of" debt issued by the municipality. Pet. at 109a (emphasis added). The final bill eliminated that express prohibition of interlocutory appeals, but set forth protections against delay and invalidation of debt incurred during the case. *Id.* The only plausible interpretation of this is that Congress desired to retain the appellate courts' discretionary authority to grant interlocutory review, but to remove the courts' ability to stay proceedings in the event that such discretionary review was granted. Nothing in the statute or the legislative history even remotely suggests that the removal of a *prohibition* on all *interlocutory* appeals should be interpreted as an express *authorization* of immediate interlocutory review in *every* case.

B. The Bankruptcy Court's Order Is Not An Appealable "Collateral Order."

The "collateral order" doctrine authorizes appellate review "from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quotation omitted). The doctrine encompasses only those orders "that are conclusive, that resolve important questions completely separate from the merits, and that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action." *Id.* This is a "narrow exception" to the final judgment rule that, this Court repeatedly has admonished, "should stay that way and never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been

entered, in which claims of district court error at any stage may be ventilated." *Id.* at 868 (citations omitted).

The Bankruptcy Court's order here fails all three required elements of the collateral order doctrine. First, it does not "conclusively" resolve a question that is "completely separate from the merits." As the Ninth Circuit noted, the question of whether the Respondent filed its bankruptcy case in good faith is one that can be raised at any time during the bankruptcy case:

> [T]he denial of Silver Sage's initial objection to the bankruptcy does not resolve the issue of bad faith in such a way that the bankruptcy court may not later dismiss the petition. If it does appear, at some time, that the City is failing to act in good faith, the bankruptcy court may dismiss the petition altogether.

Pet. at 2a, 16a. More broadly, in order to confirm a plan of adjustment of debts – which is the *raison d'etre* of a chapter 9 case – the Respondent will have to establish that the plan complies with all of the requirements of chapter 9 and the other applicable provisions of the Bankruptcy Code. *See* 11 U.S.C. § 943. Thus, far from being "collateral," the Bankruptcy Court's order goes to the very core of the underlying bankruptcy case, as it addresses the Respondent's eligibility to adjust its debts under the federal bankruptcy laws.[4]

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[4] *Cf. Warner*, 94 B.R. at 737 (order denying a motion to dismiss chapter 11 case is not a collateral order; "The bankruptcy court order denying Warner's motion to dismiss in this case does not resolve issues independent and easily separable from the other claims in the action."); *Hebb*, 53 B.R. at 1006 (order denying a motion to dismiss chapter 13

(Continued on following page)

Second, and just as importantly, the Bankruptcy Court's order is reviewable on appeal from an order confirming the Respondent's plan of adjustment or any other final judgment that concludes the Respondent's bankruptcy case. As the Fifth Circuit held in a case directly on point, an order denying an objection to a chapter 9 case is not a collateral order because "[t]he question of subject matter jurisdiction is far from unreviewable on appeal from a final judgment. When there is a final judgment in this case appellants will be free to raise the issue of subject matter jurisdiction yet again." *Path-Science Laboratories, Inc. v. Greene County Hospital (In re Greene County Hospital)*, 835 F.2d 589, 596 (5th Cir. 1988); *see also Cash Currency Exchange*, 762 F.2d at 547 (order denying motion to dismiss chapter 11 case is not a collateral order; "The denial of a motion to dismiss, . . . if erroneous, may be reversed on appeal from the approval of a final plan of reorganization.").

The Petitioners make the novel argument that the mere fact of the bankruptcy case itself causes an irreparable harm that compels immediate review. Pet. at 19-20. The Ninth Circuit correctly rejected this assertion:

> A court's denial of such a motion merely allows the municipality to proceed with the bankruptcy. We are not convinced that Congress's whole municipal bankruptcy statutory scheme is so skewed in favor of the municipality that the commencement of proceedings itself causes

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case is not a collateral order; "The order addressed issues closely related to the merits of the main action, albeit in a nondispositive manner, thereby falling outside the collateral order doctrine.").

> irreparable injury. To so hold would essentially say that a creditor's rights are determined before the bankruptcy process really begins.

Pet. at 2a, 15a.

As the Ninth Circuit noted, there are many protections available to creditors in a chapter 9 case, including the right to request withdrawal of the jurisdictional reference to the bankruptcy court (28 U.S.C. § 157(d)); the right to seek relief from the automatic stay (11 U.S.C. § 362(d)); the right to petition for adequate protection of interests in property (11 U.S.C. § 361); and the right to move at any time to dismiss the case (11 U.S.C. § 930). Pet. at 14a-16a. Moreover, if the Petitioners had been able to articulate any particular harm from the Bankruptcy Court's order, they could have been granted permission to pursue an interlocutory appeal.

In any event, this Court time and time again has rejected analogous arguments that a purported right to be free from suit in a forum that purportedly lacks jurisdiction is "effectively destroyed" unless vindicated through an immediate appeal. *See, e.g.*, *Digital Equipment*, 511 U.S. at 867-83 (order granting motion to vacate dismissal of action not a collateral order); *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-501 (1989) (order denying motion to dismiss based upon contractual forum selection clause not a collateral order); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 521-30 (1988) (order denying motion to dismiss on ground that extradited person was immune from civil process and on ground of *forum non conveniens* is not a collateral order); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275-78 (1988) (order denying motion to stay or dismiss on basis of pending state court action is not a collateral order).

The Petitioners' similar assertions of a right to an immediate appeal of the Respondent's bankruptcy case here similarly should be rejected.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE HOLDING OF ANY COURT AT ANY LEVEL

The only two other reported decisions on point are in accord with the Ninth Circuit's decision in this case, with each holding that an order denying an objection to or motion to dismiss a chapter 9 municipal bankruptcy case is interlocutory and not immediately reviewable. *Greene County*, 835 F.2d at 595-96; *In re Pleasant View Utility Dist.*, 27 B.R. 552, 553-54 (M.D. Tenn. 1982). There is not a single reported decision at any level holding that such an order is subject to an immediate appeal.

The Petitioners attempt to manufacture a circuit conflict by citing the unpublished decision of the Third Circuit in *Pennbank v. Washabaugh (In re North and South Shenango Joint Municipal Authority)*, 673 F.2d 1301 (3d Cir. 1981) (mem.), cited by the Petitioners for the first time only in their petition for rehearing to the Ninth Circuit. Pet. at 16-17. In *Shenango*, however, the Third Circuit *declined* immediate review of an order denying an objection to a municipal bankruptcy case. Specifically, the Circuit denied a petition for writ of mandamus and held that any error of the bankruptcy court "may be raised through the prescribed process of appeal." Pet. at 118a. Much as they do with section 921(e), the Petitioners try to extrapolate this into an implied right of immediate appeal. However, the Circuit never addressed the issue of *when* the "prescribed process of appeal" would be undertaken. Under the clear authority set forth above, the only logical

reading is that the "process" referenced by the Circuit was the standard "process" involving discretionary interlocutory review, and review as a matter of right only after the entry of a final judgment itself.

III. THE NINTH CIRCUIT'S DECISION DOES NOT RAISE ANY ISSUE OF CONSTITUTIONAL LAW

The Petitioners argue that a failure to accord them an immediate appeal "creates the opportunity for the Tenth Amendment power of the states to be ignored." Pet. at 15. This fantastic claim merits little scrutiny.

Chapter 9 in fact is crafted to *preserve* state sovereignty by requiring that, unlike under other chapters of the Bankruptcy Code, a municipal debtor be "specifically authorized, in its capacity as a municipality or by name, to be a debtor . . . by State law. . . ." 11 U.S.C. § 109(c)(2). Moreover, as the Petitioners recognize, chapter 9 expressly and unambiguously preserves a state's control over its municipalities while a bankruptcy case is pending. *See* 11 U.S.C. §§ 903, 904.

This Court specifically has held that the requirement of state consent, and the limitations on a bankruptcy court's control over a municipality during a bankruptcy case, protect the municipal bankruptcy laws from an attack based on Tenth Amendment or sovereign immunity grounds:

> The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the State to oppose federal interference. The State steps in to remove that obstacle. The State

> acts in aid, and not derogation, of its sovereign powers. It invites the intervention of the bankruptcy power to save its agency which the State itself is powerless to rescue. Through its cooperation with the national government the needed relief is given. We see no ground for the conclusion that the Federal Constitution, in the interest of state sovereignty, has reduced both sovereigns to helplessness in such a case.

Bekins, 304 U.S. at 54.

Here, the State of California has authorized the Respondent to file a chapter 9 bankruptcy case. *See* Cal. Gov't Code §§ 43739, 53760.[5] The State has never objected to the Respondent's bankruptcy case or otherwise contested any actions taken in that case. In this light, the Petitioners' assertions of "states' rights" are empty. Most importantly for purposes of the Petition, any conceivable argument that the Respondent's bankruptcy case is improper – whether based on the Constitution, the Bankruptcy Code, or anything else – will be preserved and can be addressed on an appeal from a final judgment.

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[5] Contrary to the Petitioners' baseless assertions, in addition to finding state authorization, the Bankruptcy Court found that the City satisfied all of the other statutory qualifications for chapter 9 eligibility as well. *See* Pet. at 44a-46a.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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